IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-740

JAMES S. GRAHAM,

Appellant,

VS.

MARCH FONG EU, Secretary of State,
and REPUBLICAN STATE CENTRAL COMMITTEE
OF CALIFORNIA,

Appellees.

On Appeal from the United States District Court
for the Northern District of California

Motion to Affirm

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Appellee, Republican State Central Committee of California (hereinafter referred to as "RSCCC"), moves, pursuant to Supreme Court Rule 16, to affirm the judgment of the District Court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

After the presentation of evidence and hearing arguments on the merits, the District Court held that the Republican Party's winner-take-all presidential primary election

system as established by California statute did not violate appellant's rights under the Equal Protection Clause of the Fourteenth Amendment or the First Amendment. The District Court relied principally on this Court's decisions in *Whitcomb v. Chavis,* 403 U.S. 124 (1971), and *Williams v. Virginia State Board of Elections,* 288 F. Supp. 622 (E.D. Va. 1968), *aff'd mem* 393 U.S. 320 (1969), which upheld the constitutionality of the winner-take-all rule within, respectively, the contexts of legislative apportionment schemes and the Electoral College.

Relying upon the standards set forth in *Whitcomb,* the District Court found that appellant had failed to prove that any identifiable group "had less opportunity than did other[s] . . . to participate in the political process and to elect [delegates to the National Convention] of their choice." *Whitcomb v. Chavis, supra* at 149.

ARGUMENT

I. California's Winner-Take-All Republican Presidential Primary Election Does Not Violate the Equal Protection Clause.

In this action appellant seeks to declare Cal. Elec. Code § 6201 unconstitutional on the grounds that California's "winner-take-all" Republican presidential primary election violates the Equal Protection Clause of the Fourteenth Amendment.[1] His theory is that the winner-take-all primary

1. Citations to the California Election Code are to sections which were in effect at the time of trial. On September 24, 1975 the provisions of former Chapter 1, commencing with Section 6000, of Division 5 of the California Elections Code was repealed and superseded by Assembly Bill No. 427. The new law modifies the procedure for presidential primary elections of the Republican Party in California, but retains the winner-take-all rule of the former statute. Sections 6056, 6071(c), Cal. Elec. Code. Assembly Bill No. 427 is set forth in the Appendix.

violates the Equal Protection Clause because it does not afford proportionate representation at the National Convention of the various political factions within the Party.

To date the only decisions by this Court applying equal protection principles to the electoral process have involved the first tier of the electoral process, *i.e.,* the method by which representatives are chosen. At no time has this Court ruled that various political factions are entitled to proportionate representation. It has merely ruled that eligible voters must have equal access to the political process, that all votes be weighed equally, and that the election procedure may not contain a built-in bias which dilutes or cancels the voting strength of identifiable racial or political groups.[2]

2. For example, the *White Primary Cases* collectively held that the Equal Protection Clause was violated by systems which prevented blacks from participating in primary elections or in state nominating conventions held in lieu of primary elections. *Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allwright,* 321 U.S. 649 (1944); *United States v. Classic,* 313 U.S. 299 (1941); *Nixon v. Condon,* 286 U.S. 73 (1932); *Nixon v. Herndon,* 273 U.S. 536 (1927); *Newberry v. United States,* 256 U.S. 232 (1921).

The *Reapportionment Cases* similarly imposed the one man—one vote standard on elections of legislative representatives and other governmental officials. *Baker v. Carr,* 369 U.S. 186 (1962); *Mahan v. Howell,* 410 U.S. 315 (1973); *Kirkpatrick v. Preisler,* 394 U.S. 526 (1969); *Reynolds v. Sims,* 377 U.S. 533 (1964); *Wesberry v. Sanders,* 376 U.S. 1 (1964); *Abate v. Mundt,* 403 U.S. 182 (1971); *Hadley v. Junior College District,* 397 U.S. 50 (1970); *Avery v. Midland County,* 390 U.S. 474 (1968).

The *Ballot Access Cases* were only concerned with the ability of candidates for public office to be placed on the ballot. *Williams v. Rhodes,* 393 U.S. 23 (1968); *Moore v. Ogilvie,* 394 U.S. 814 (1969); *Bullock v. Carter,* 405 U.S. 134 (1972).

On the other hand *Irish v. Democratic-Farmer-Labor Party of Minnesota,* 399 F.2d 119 (8th Cir. 1968), rejected the contention that the State convention which selected delegates to the national convention must be apportioned on the basis of one man, one vote. It held that the requirements of the Equal Protection Clause were satisfied since all party members were entitled to participate equally at the precinct caucuses. *Accord, Smith v. State Exec. Comm. of Dem. Party of Ga.,* 288 F. Supp. 371 (N.D. Ga. 1968).

It has also been held that where delegates to the national convention are chosen at state conventions (rather than by primary elections) the delegates to the state conventions must be appor-

RSCCC contends that the principles of the Equal Protection Clause are not offended by the winner-take-all rule in presidential primary elections, and that it is manifestly inappropriate to extend those principles into the intra-party process of selecting a political party's Presidential and Vice Presidential candidates.

Appellant does not contend that the principle of one man-one vote established by *Baker v. Carr,* 369 U.S. 186 (1962), is violated by the winner-take-all rule. Indeed, no such contention is possible, because the election is conducted on a statewide basis, each eligible Republican voter being entitled to an equally weighted vote. Rather, appellant contends that the winner-take-all rule contains a built-in bias which dilutes and cancels the voting strength of discernible voting elements.

The thrust of appellant's argument is that the winner-take-all rule is inherently unfair because voters for non-plurality candidates are not represented at the Republican National Convention, particularly at the time when Presidential and Vice Presidential candidates are nominated. He contends that the Equal Protection Clause requires that non-plurality factions must have the possibility of obtaining delegate representation, and suggests that this can be best accomplished by the election of delegates from districts within the State.

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tioned among geographic units within the state. *Seergy v. Kings County Republican County Committee,* 459 F. 2d 308 (2d Cir. 1972); *Redfern v. Delaware Republican State Committee,* 362 F. Supp. 65 (D. Del. 1973); *Doty v. Montana State Central Committee,* 337 F. Supp. 49 (D. Mont. 1971); *Maxey v. Washington State Central Committee,* 319 F. Supp. 673 (W.D. Wash. 1970). The common denominator among these cases is that the courts required proportionate representation at the *state convention*—*i.e.,* the first tier at which state delegates to the national convention were selected. None of those decisions required that delegates to the national convention represent the various and diverse interest present at the state convention.

The substance of appellant's arguments is not novel. He belabors at length the real or alleged shortcomings of the winner-take-all rule which have been carefully considered by this Court on several recent occasions in a series of decisions regarding multi-member legislative districts. Although this Court has expressed a judicial preference for single-member districts in court ordered reapportionment plans on the basis of its supervisory powers, *Chapman v. Meier,* 420 U.S. 1 (1975), it has consistently held that the winner-take-all rule is not *per se* unconstitutional. Rather, the challenger bears the burden of establishing that the scheme "was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns v. Richardson,* 384 U.S. 73, 89 (1966). *Accord, Chapman v. Meier,* 420 U.S. 1, 17 (1975); *White v. Regester,* 412 U.S. 755, 765 (1973); *Whitcomb v. Chavis,* 403 U.S. 124, 144 (1971); *Kilgarlin v. Hill,* 386 U.S. 120 (1967); *Forston v. Dorsey,* 379 U.S. 433, 439 (1965).

The District Court found that "plaintiff has failed to demonstrate factually that any identifiable group has been denied, because of racial or political differences, an opportunity to participate in the Republican primary and to elect delegates of its choice". Appellant contends that the District Court's decision was contrary to this Court's teachings in *Whitcomb v. Chavis,* 403 U.S. 124 (1971). Nevertheless, in his arguments before the District Court, and again in his Jurisdictional Statement, appellant has failed, and is apparently unable, to fulfill the two criteria which are necessary for a successful attack. First, he has completely failed to specify the characteristics which serve to identify the "discernible voting elements" which are allegedly discriminated against. Nor does he assert that he is a member of any identifiable minority, or that he has anything in

common with any recognizable group of voters. Indeed, in his declaration submitted to the District Court, appellant stated that "in light of the fact that in California delegates were awarded only to the candidate winning the primary campaign, I chose not to cast my ballot and did not vote in the [1972] primary election at all." Nor is there any evidence that appellant voted, or was eligible to vote, in any other primary elections.

Secondly, appellant has failed to show that the winner-take-all rule was "conceived or operated as [a] purposeful device to further racial or economic discrimination." *Whitcomb v. Chavis, supra,* at 149. In *Whitcomb* this Court rejected the motion "that any group with distinctive interests must be represented in [the final decision-making forum] if it is numerous enough to command at least one seat". 403 U.S. at 156. In response to arguments strikingly similar to those of appellant, this Court stated,

> The failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of the ghetto residents may have been cancelled out as the District Court held, but this is a *mere euphemism for political defeat at the polls* . . .[W]e have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year. *Id.* at 153.*

These principles were recently reaffirmed in *Chapman v. Meier,* 420 U.S. 1 (1975), where this Court said "there must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. *There must be evidence that the group has been denied access to the political process equal to the access of other groups." Id.* at 17.

*Emphasis supplied throughout, unless otherwise noted.

By way of contrast, *White v. Regester,* 412 U.S. 755 (1973), affirmed the decision of the District Court which held under the facts in that case that a legislative reapportionment scheme which provided for multi-member districts in two counties invidiously discriminated against cognizable racial or ethnic groups, and therefore violated the Equal Protection Clause. However, this Court reiterated that,

> *It is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.* The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less *opportunity* than did other residents in the district to *participate* in the political processes and to elect legislators of their choice. *Id.* at 765-66.

The District Court reviewed the history of racial discrimination in Texas, its relationship with the effects of multi-member districting and concluded that " 'the black community has been effectively excluded from participation in the Democratic primary selection process,' and was therefore generally not permitted to enter the political process in a reliable and meaningful manner." *Id.* at 767. The District Court also found that "the multi-member district, as designed and operated in Bexar County, invidiously excluded Mexican-American from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives." *Id.* at 769.

The factors supporting the decision in *White v. Register* are totally lacking in the instant case. There is no claim of racial discrimination, nor discrimination against any other cognizable group. Furthermore, there is no evidence that the winner-take-all rule contains any built-in biases or was conceived or operated to perpetuate any discrimination.

Although appellant stresses that the primary election in California is state-wide and that a victory in that election may increase a candidate's power at the National Convention, this Court, nevertheless, has made it clear that the elements of proof remain the same regardless of the size of the constituency. *Chapman v. Meier, supra* at 17.

From the foregoing, it is clear that minority elements of an electorate must be given an equal opportunity to participate in the election of their representatives. But the Equal Protection Clause does not require that "distinctive substantive-law interests" of such minority groups be proportionately represented in legislatures, much less that all of the various, divergent and fluid political factions which form within the Republican Party during primary election campaigns be proportionately represented at its National Convention.

Appellant's contentions to the contrary notwithstanding, the similarity between multi-member districting and the winner-take-all primary is quite striking. At the voter level, the first tier of the process, all voters have an equal opportunity to vote, their votes are weighed equally in determining the outcome of the election, and the winning candidates are vested with all of the allocated political power of the constituency. At the second level, whether the legislature or a national convention, the elected representatives have the right to cast their votes consistent with the wishes of the electorate which chose them for office. The fact that certain minority factions may be unrepresented at the second level is not because of a violation of the Equal Protection Clause, but because of political defeat at the polls.

In addition to the reapportionment cases just discussed, this Court has had occasion to consider the constitutionality of the winner-take-all rule in the context of the Electoral College. In *Williams v. Virginia State Board of Elections,*

288 F. Supp. 622 (E.D. Va. 1968) *aff'd mem.*, 393 U.S. 320 (1969), the plaintiffs attacked the constitutionality of Virginia's winner-take-all rule in Presidential elections which provided for a state-wide election and for the successful Presidential candidate to be entitled to all of the State's electors. As in the present case, plaintiffs complained that Virginia's state-wide winner-take-all rule was unfair because it did not afford minority representation among the electors. The District Court rejected the plaintiffs' claims and upheld the constitutionality of the statute.

In facts in *Williams* are strikingly parallel to those of the present case. At the first voting tier all eligible voters cast votes of equal weight, the successful candidate was entitled to all of the state's electors, and those electors were committed to a given candidate. It was not until the second voting tier, *i.e.*, the Electoral College, that the minority voters were unrepresented.

Although appellant would have this Court read *Williams* as resting solely on a construction of Article II, Section 1, and the Twelfth Amendment to the Constitution, such is not the case. On the contrary, the District Court stated: "the authorization of each State by Article II to 'appoint, in such manner as the Legislature thereof may direct' is 'subject to possible constitutional limitations.'" 288 F. Supp. at 626. Thereafter, it analyzed the case on the basis of the Equal Protection Clause and the one person-one vote rule and stated:

> In the selection of electors the [winner-take-all] rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidious. No such

> evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the suffrage is suffered by anyone. 288 F.Supp. at 627.

If the District Court, or this Court, had concluded that the winner-take-all rule was contrary to the Equal Protection Clause, nothing in Article II, Section 1, would have prevented the imposition of the districting remedy. The District Court considered arguments of vote dilution and cancellation that were virtually identical with those made in this case and held that the winner-take-all method of election was consistent with the dictates of the Equal Protection Clause.

Appellant places great reliance upon the decision in *Gray v. Sanders,* 372 U.S. 368 (1972), in which this Court held unconstitutional Georgia's county unit system of counting votes in state-wide primary elections for United States Senator and state-wide offices because that system resulted in weighing the rural vote more heavily than the urban vote and weighed some rural counties heavier than other larger rural counties. This Court stated: "once the geographic unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote . . ." *Id.* at 379. Thus, the evil struck down in that case was the disproportionate weighing of votes as a result of geographic factors, an issue not presented in the present case. It should also be noted that in *Gray* this Court specifically left open the question of whether the Equal Protection Clause governs conventions used for nominating candidates in lieu of the primary election system. *Id.* at 378, n. 10. This Court did observe, however, "the only weighing of votes sanctioned by the Constitution concerns *matters of representation,* such as the allocation of Senators irrespective of population and the use of the Electoral College in the choice of a President." *Id.* at 380.

From the foregoing discussion, the principle clearly emerges that nothing in the Constitution requires that all minority interests be proportionately represented at all government levels. Just as electors to the Electoral College and legislators may be elected on a winner-take-all basis, so also may the Republican voters of California choose their delegates to the National Convention. Since appellant has failed to demonstrate that the winner-take-all rule contains a built-in bias which discriminates against any identifiable groups, this motion should be granted and the decision of the District Court affirmed.

II. This Court Has Increasingly Recognized the Impropriety of Further Judicial Intrusions into Intra-Party Affairs.

By this action appellant seeks to induce this Court to extend the one man-one vote principles of the Equal Protection Clause beyond the elective stage and into the representative stage of the essentially political and deliberative process of selecting a political party's Presidential and Vice Presidential candidates.

Shortly stated, appellant invites this Court to inject itself into internal affairs of the Republican Party—namely the manner in which the political power of the State of California must be exercised at the Republican National Convention. On the other hand, appellee RSCCC contends that this case is singularly appropriate for exercise of judicial restraint following the example set in several recent decisions of this Court and lower federal courts. As will be developed below, judicial restraint has been manifested in related cases by the refusal of the courts to attempt to superimpose the principles of the Equal Protection Clause on the inner workings of political parties.

The most recent such example is *Cousins v. Wigoda,* 419 U.S. 477 (1975), which involved the competing claims of two delegations from Chicago to be seated at the 1972 Dem-

ocra[illegible] National Convention. The Wigoda delegates had been elected at the March 1972 Illinois primary election consistent with applicable state law; the Cousins delegates had been chosen at private caucuses held in Chicago after having been previously defeated at the primary. At the convention, the Cousins delegates successfully challenged the seating of the Wigoda delegates on the ground, among others, that the slate-making procedures under which the Wigoda delegates were selected violated the Democratic Party rules. Thereafter, the Cousins delegates were seated and fully participated in the Convention.

This Court was confronted with a conflict between the Illinois election laws and the Democratic Party's rules, and held that the Party's rules prevailed over contrary state law. Thus, it held that the Cousins delegates, which had been selected at private caucuses rather than by popular election, had been properly seated. This ruling was an exercise of judicial restraint on several levels. First, it established that national party rules regarding the qualifications of delegates are not subject to being overturned by inconsistent state laws. Second, it ratified the decisions of the convention which seated the Cousins delegates, thereby avoiding questions as to the validity of the convention decisions in which the Cousins delegates participated. Third, and of particular significance to this case, it held that the cor[illegible]ention acted properly in rejecting the delegates who had been popularly elected and by seating those who had been chosen at private caucuses.

Although this Court expressly disclaimed any view on the issue of "whether national political parties are subject to the principles of the reapportionment decisions, or other constitutional restraints in their methods of delegate selection and allocation", *Id.* at 484, n. 4(2), that decision certainly bears on such questions inasmuch as this Court

approved the action of the convention in seating the Cousins delegates. This Court's ruling virtually rejected any notion that national convention delegates must be chosen on the basis of one man-one vote, much less that the delegates must proportionately represent the various political factions of their constituencies. Indeed, the effect of this Court's holding is to the contrary—convention delegates may be selected without a popular vote if chosen consistent with the Party's rules.

Thus, in *Cousins,* this Court held that the First Amendment's guarantee of freedom of political association elevated the Democratic Party's rules regarding the qualifications of delegates to a stature superior to that of inconsistent state law. *A fortiori,* when state law is consistent with a national party's rules, the validity of the state law should receive the same protection. In the present case, California's winner-take-all rule is consistent with the Republican Party's rules and both should thus partake of First Amendment protection.

Cousins v. Wigoda was the sequel to this Court's earlier decision in *O'Brien v. Brown,* 409 U.S. 1 (1972), which involved the same basic dispute, and in which this Court stressed the desirability of judicial restraint. In *O'Brien,* and the companion case of *Keane v. National Democratic Party,* convention delegates from California and Illinois challenged the actions of the 1972 Democratic Convention's Credentials Committee which had recommended that plaintiffs be unseated. The District Court dismissed the complaints, but the Court of Appeals reversed, granting relief to the California delegates and denying relief to the Illinois delegates, 469 F.2d 563 (D.C. Cir. 1972). On review, this Court granted stays of the judgments of the Court of Appeals principally on the ground that the case was not appropriate for judicial intervention. This Court noted:

No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do *relationships of great delicacy that are essentially political in nature. Judicial intervention in this area traditionally has been approached with great caution and restraint.* See *Irish v. Democratic-Farmer-Labor Party of Minnesota,* 399 F.2d 119 (8th Cir. 1968); *Lynch v. Torquato,* 343 F.2d 370 (3d Cir. 1965); *Smith v. State Exec. Comm. of Dem. Party of Ga.* 288 F.Supp. 371 (N.D. Ga. 1968). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. 409 U.S. at 4.

It should not be overlooked that the challenge to the California delegation in *O'Brien* was based on California's winner-take-all primary election law applicable to the Democratic Party (since altered), the challengers arguing that the winner-take-all rule violated that party's rules. Neither the Court of Appeals nor this Court addressed the constitutional issue involved, although it appears that the challengers argued that a state's delegation should be distributed in proportion to the votes received by the candidates they represent. Nevertheless, the effect of this Court's action was to leave the decision to the convention.[3]

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3. *O'Brien* was finally dismissed a moot, 409 U.S. 816 (1972), and its companion case, *Keane v. National Democratic Party,* was remanded to the Court of Appeals, 409 U.S. 816 (1972), where it was dismissed. 475 F.2d 1287 (1973).

The most recent example of judicial restraint is found in the decision of *Ripon Society v. National Republican* Party, ... F.2d ...., 44 U.S.L.W. 2161 (D.C. Cir. 1975). The plaintiffs attacked the constitutionality of the Republican Party's method of allocating delegates among the States, alleging that the formula violated the one man-vote standard of the Equal Protection Clause because it did not allocate delegates in proportion to the States' populations. The Court of Appeals rejected the notion that the Equal Protection Clause is applicable to such internal affairs of the Republican Party, stating that:

> "[n]ational conventions have never been conceived as having the function of providing a strict one person-one vote representation to a definable national constituency . . . . Moreover, the interests advanced by adopting representation schemes of the party's own choosing seen to be of great importance and of clearly constitutional stature." *Id.* at 2162.

The primary basis upon which the Court of Appeals rested its decision was the First Amendment's guarantee of free political association. In this regard, the court stated:

> What is important is that a party's choice of the one way of governing itself that seems best calculated to strengthen the party and advance its interests deserves the protection of the constitution as much, if not more, than its condemnation. The constitutional rights of speech and assembly are of slight value if they do not carry with them a comitant (sic) right of political association . . . there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective.
>
> . . . Therefore, the Equal Protection Clause, assuming it is applicable, does not require a representation in presidential nominating conventions of some defined constituency on a one person-one vote basis. *Id.* at 2162.

It is evident from a review of this decision that the central issue concerned the manner in which the political power of the Republican Party may be allocated and exercised. Although the Court of Appeals for the District of Columbia had earlier demonstrated no reluctance to become involved in such matters (e.g., *O'Brien v. Brown,* 469 F.2d 563 (D.C. Cir. 1972), *stay granted,* 409 U.S. 1 (1972), *Georgia v. National Democratic Party,* 447 F.2d 1271 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 858 (1972) and *Bode v. National Democratic Party,* 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1019 (1972)), its decision in *Ripon* apparently signaled its acknowledgment and understanding of this Court's contrary inclinations as exhibited in *O'Brien* and *Cousins.* As the Court of Appeals stated in *Ripon,* "it is the essence of the First Amendment rights that the parties exercise that they make their own contrary (and rational) judgments without interference from the courts." *Id.* at 2162-63.

The perception of the Court of Appeals in *Ripon* is surely correct. The approval of the *Smith, Irish* and *Lynch* cases in this Court's opinion in *O'Brien* and the later decision in *Cousins* clearly demonstrate this Court's conviction that judicial intrusions into intra-party affairs should not go beyond assuring both equal voter participation and full voter protection at the grass roots level of the delegate selection process. The reason for such restraint is clear: judicial intervention may have a significant impact on the delicate balance of power between competing party factions and could produce substantial and unanticipated changes in the operation of the political system itself. Considering these potential effects, the courts lack judicially manageable standards for dealing with such questions. *See, e.g.,* Note: *One Man, One Vote and the Selection of Delegates to National Nominating Conventions,* 37 U. Chi. L. Rev. 536, 547 (1970).

III. The Winner-Take-All Primary Election Rationally Advances Legitimate State Interests.

Appellant contends that the District Court erred by failing to test the winner-take-all rule by a standard of strict review. The District Court reached this conclusion on the basis that appellant had not demonstrated that the winner-take-all rule operates to discriminate against any identifiable political group (fn. 30). In his Jurisdictional Statement, appellant contends that proof of such discrimination is not a necessary predicate to employing the strict standard of judicial review, relying on this Court's decisions in *Bullock v. Carter,* 405 U.S. 134 (1972); *Hill v. Stone,* 421 U.S. 289 (1975); *Kusper v. Pontikes,* 414 U.S. 51 (1973); and *Storer v. Brown,* 415 U.S. 724 (1974) Although it is true that the challengers in those cases were not required to identify specific political groups in order to sustain their challenges, each of those cases involved various restrictions on the exercise of the right of suffrage, matters which are not in issue in this case. *Hill* and *Kusper,* respectively, involved rules which disenfranchised those who did not own real property and those who desired to change their party affiliations. *Storer* and *Bullock* involved restrictions which prevented candidates from being placed on the ballot. These cases are inapposite simply because the present case does not involve any infringements on the exercise of the right to vote. The issues, as presented by appellant, involve solely the results of elections.

Considering that appellant has failed to demonstrate that the winner-take-all rule infringes upon the protections of the Equal Protection Clause, it is evident that the statute in question must be judged by the so-called "rational relationship" test rather than the "compelling state interest" test.

The applicable standard of judicial scrutiny is found in the decision of *McDonald v. Board of Election Commis-*

sioners of Chicago, 394 U.S. 802 (1969), where this Court held that an Illinois statute which denied unsentenced prisoners the right to vote by absentee ballot did not violate the Equal Protection Clause in the absence of evidence that they were absolutely prohibited from voting. Clearly the statute in question severely hampered the unsentenced prisoners in the exercise of their right to vote. Nevertheless, this Court rejected the applicability of the "compelling state interest" test, saying that

> Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of *wealth* or *race*. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme had an impact on appelants' *ability to exercise the fundamental right to vote*. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. 394 U.S. at 807.

The rationale of *McDonald* is applicable to the present case. Appellant does not contend that the winner-take-all primary discriminates on the basis of wealth, race, geography or other "invidiously discriminatory" factors. Rather, his complaint is that it prevents proportionate representation of divergent philosophies at the national convention. It follows from *McDonald* that in a case such as the present where the challenged statute does not create "constitutionally suspect" classifications, and does not even hamper the citizen's exercise of the right to vote as did the Illinois law, the "rational relationship" test is the appropriate standard, and appellant must establish by competent evidence that the statute in question is totally unrelated to the pursuit of a legitimate state end.

In *McDonald* the "rational relationship" was defined as follows:

> . . . [The] statute must bear some *rational relationship* to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons *totally unrelated to the pursuit of that goal.* Legislatures are *presumed* to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if *no grounds can be conceived of to justify them.* 394 U.S. at 809.

In evaluating the constitutionality of the winner-take-all primary election rule, the court must "consider all the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interest of those who are disadvantaged by the classification." *Williams v. Rhodes,* 393 U.S. 23, 30 (1968). *Accord, Dunn v. Blumstein,* 405 U.S. 330, 335 (1972); *Storer v. Brown,* 415 U.S. 724, 730 (1973).

In a series of recent decisions, this Court has approved the legitimacy of the following state interests as a basis for regulating elections. The state has a "substantial State interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community and in providing the electorate with an understandable ballot . . . ". *Storer v. Brown, supra* at 729; *Williams v. Rhodes,* 393 U.S. 23, 32 (1968). The state has a *compelling* interest in maintaining the stability of its political system which is intimately dependent upon preserving the integrity of its political parties. *See Storer v. Brown,* supra at 736. *Accord, Rosario v. Rockefeller,* 410 U.S. 752 (1973); *Kusper v. Pontikes,* 414 U.S. 51 (1973).

In *Storer* this Court agreed with the State of California's concern that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government."

415 U.S. at 736. It has further recognized that a state has a "legitimate interest in regulating the number of candidates on the ballot" and may properly seek "to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a substantial plurality, of those voting . . . ". Moreover, a state has an interest if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidates. *Bullock v. Carter,* 405 U.S. 134, 145 (1972). *Accord, Storer v. Brown, supra* at 732; *Williams v. Rhodes, supra,* at 32; *Jenness v. Fortson,* 403 U.S. 431, 442 (1971).

Subsequently, in *American Party of Texas v. White,* 415 U.S. 767 (1974), this Court deemed the state's interest in preserving the integrity of the electoral process and regulating the number of candidates on the ballot to avoid voter confusion a *compelling* state interest. *Id.* at 782, n. 14. Finally, it has held that the state has a legitimate interest in preserving the integrity of the nominating process of party primary election. *American Party of Texas v. White, supra* at 786.

It is clear that the statute in question in the instant case advances the foregoing state interests and is rationally related to the pursuit of those goals. The winner-take-all primary is designed to assure that California's delegation to the Republican National Convention represents the views of the majority, or at least a substantial plurality, of those voting. By permitting a unified delegation, California fosters unity in the state's Republican Party. Voting as a bloc, the California Republican delegation may more successfully influence the national convention to nominate a Presidential candidate and adopt programs as part of the Party's campaign platform that will meet with the approval not only of California Republicans, but California voters generally.

In short, the winner-take-all rule advances several significant and compelling state interests and is rationally related to the achievement of a legitimate state end. Certainly it cannot be said that the statute in question is "based on reasons totally unrelated to the pursuit of that goal" or that the statutory scheme should be set aside because "no grounds can be conceived to justify them." *McDonald v. Board of Election Commissioners of Chicago, supra* at 809.

IV. Conclusion.

From the foregoing it is clear that the one man-one vote principle of the Equal Protection Clause and the First Amendment's guarantee of freedom of political association do not require that state delegates to national political conventions must be apportioned among the various Presidential candidates participating in the primary election. In complete conformance with the theories underlying our representative form of government, national convention delegates are *representatives* of the state's political party at the convention, and there is no Constitutional mandate that the various philosophical factions of given constituencies be afforded proportionate representation. The Constitution simply demands that all eligible voters be equally entitled to participate in the process whereby representatives are chosen. Thus, just as a state's representatives in the Electoral College or the members of a multi-member legislative district may be elected on a winner-take-all basis, so also may a state's delegates to a national political convention be chosen.

A rule to the contrary, imposing the one man-one vote principle, would have serious ramifications far beyond the instant case. If a state's allocated number of convention delegates must be apportioned among all contenders in the primary election, the obvious and necessary result is a Constitutional mandate that every state hold a Presidential

primary election for each political party. According to appellant's own law review article, only twenty-three jurisdictions held Presidential primaries in 1972, and among them there were at least four general types of systems. Note: *One Person-One Vote: The Presidential Primaries and Other National Convention Delegate Selection Processes,* 24 Hastings L. Rev. 257, 274 (1973). If convention delegates must be apportioned among the Presidential candidates on the basis of election results not only must each of these twenty-four jurisdictions conform their election systems, but the remaining jurisdictions must also hold Presidential primary elections. Clearly a rule of such constitutional magnitude cannot apply to the State of California alone.

The impact on the states as well as Presidential candidates would be enormous. At least one major factor pertinent to a state's decision not to hold a Presidential primary is the substantial cost involved. From the candidate's viewpoint, he has neither the time nor the funds to actively compete in primary elections in each jurisdiction. What could be more discouraging to potential candidates that the necessity of spending the time and investing the resources necessary to compete in primary elections throughout the nation? Indeed, only those few candidates with overwhelming resources could ever participate in, much less survive, the primary process demanded by appellant. Surely the Constitution does not impose such unreasonable demands.

For the foregoing reasons, appellee RSCCC urges that its motion to affirm be granted and the decision of the District Court affirmed.

Dated: December 19, 1975

Respectfully submitted,

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(Appendix Follows)

Appendix

Assembly Bill No. 427

CHAPTER 1048

An act to repeal and add Chapter 1 (commencing with Section 6000) of Division 5 of the Elections Code, relating to the presidential primary.

[Approved by Governor September 24, 1975. Filed with Secretary of State September 24, 1975.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 1 (commencing with Section 6000) of Division 5 of the Elections Code is repealed.

SEC. 2. Chapter 1 (commencing with Section 6000) is added to Division 5 of the Elections Code, to read:

CHAPTER 1. PRESIDENTIAL PRIMARY

Article 1. General Provisions

6000. The provisions of this chapter shall be applicable only to the presidential primary ballot of the Republican Party, and qualified parties for which no other provisions apply.

6001. The provisions of this code relating to the direct primary apply to the presidential primary insofar as the former do not conflict with the latter.

Article 2. Number and Certification of Delegates

6005. The chairman of the state central committee shall notify the Secretary of State on or before the first day of February immediately preceding the presidential primary as to the number of delegates to represent the state in the next national convention of his party.

6006. The notification of the number of delegates shall be in substantially the following form:

STATEMENT OF NUMBER OF DELEGATES TO THE REPUBLICAN PARTY NATIONAL CONVENTION

To the Secretary of State
Sacramento, California

You are hereby notified that the number of delegates to represent the State of California in the next national convention of the Republican Party is .....

Dated this ..... day of ....., 19.....

.....

Chairman of the State Central Committee
of the Republican Party.

6007. If the chairman of the state central committee fails to file a notice as to the number of delegates, the Secretary of State shall ascertain the number from the call for the national convention issued by the national committee of the party.

6008. The Secretary of State shall, on or before the 10th day of February of the year of the presidential primary, certify to the county clerk of each county the number of delegates to be elected by the Republican Party.

6009. The certification to the county clerk of the number of delegates shall be in substantially the following form:

CERTIFICATE OF SECRETARY OF STATE AS TO NUMBER OF DELEGATES TO THE REPUBLICAN PARTY NATIONAL CONVENTION

To the County Clerk of ..... County:

I hereby certify to you that the Republican Party is qualified to participate in the presidential primary to be held in this state on the ..... day of ....., 19....., and

the number of delegates to be elected by the Republican Party to represent the State of California in its next national convention is .....

Dated at Sacramento, California, this ..... day of February, 19.....

.....

Secretary of State

(SEAL)

Article 3. Selection of Candidates by the Secretary of State

6010. The Secretary of State shall place the name of a candidate upon the Republican presidential primary ballot when the Secretary of State shall have determined that such a candidate is generally recognized throughout the United States or California as a candidate for the nomination of the Republican Party for President of the United States.

On or before February 1 immediately preceding a presidential primary election the Secretary of State shall publicly announce and distribute to the news media for publication a list of the candidates he intends to place on the ballot at the following presidential primary election. Following this announcement he may add candidates to his selection, but he may not delete any candidate whose name appears on the announced list.

6011. When the Secretary of State decides to place the name of a candidate on the ballot pursuant to Section 6010, he shall notify the candidate that his name will appear on the ballot of this state in the presidential primary election.

The secretary shall also notify the candidate that he may withdraw his name from the ballot by filing with the Secretary of State an affidavit pursuant to Section 6012 no later than the 64th day before the election.

6012. If a selected candidate or a nonselected candidate files with the Secretary of State, no later than the 64th day before the presidential primary, an affidavit stating without qualification that he is not now a candiate for the office of President of the United States at the forthcoming presidential primary election, his name shall be omitted from the list of names certified by the Secretary of State to the county clerks for the ballot and his name shall not appear on the presidential primary ballot.

6013. Any unselected candidate desiring to have his name placed on the presidential primary ballot shall have nomination papers circulated in his behalf. In order to qualify his name for placement on the presidential primary ballot, the candidate's nomination papers shall be signed by voters registered as affiliated with the Republican Party equal in number to not less than 1 percent of the number of persons registered as members of the Republican Party, as reflected in the report of registration issued by the Secretary of State in January of the year of the presidential primary election.

Article 4. Nomination Papers

6021. Nomination papers properly prepared, circulated signed and verified shall be left, for examination, with the county clerk of the county in which they are circulated, at least 74 days prior to the presidential primary.

6024. Each signer of a nomination paper may sign only one paper. He shall declare his intention to support the candidate for nomination, add his place of residence, and give his street and number if any. His election precinct shall also appear on the paper just preceding his name, and he shall write the date of his signature at the end of the line just after his residence.

6025. Any nomination paper may be presented in sections. Each section shall contain the names of the candidate.

Each section shall bear the name of the county in which it is circulated. Only voters of the county registered as intending to affiliate with the political party by which the nominations are to be made are competent to sign.

6026. Each section shall be prepared with the lines for signatures numbered, and shall have attached the affidavit of the verification deputy who obtained signatures to it, stating that all the signatures to the attached section were made in his presence, and that to the best of his knowledge and belief each signature to the section is the genuine signature of the person whose name it purports to be. No other affidavit is required. The affidavit of any verification deputy shall be verified free of charge by any officer authorized to administer oaths.

6027. A verified nomination paper is prima facie evidence that the signatures are genuine and that the persons signing it are voters, until it is otherwise proved by comparison of the signatures with the affidavits of registration in the office of the county clerk.

6028. The nomination paper for a candidate shall be in substantially the following form:

SECTION OF NOMINATION PAPER SIGNED BY VOTER ON BEHALF OF CANDIDATE

Section ..... Page .....

County of ..... Nomination paper for ..... as presidential nominee of the Republican Party.

State of California }
County of ..... } ss.

Signer's Statement

I, the undersigned, am a voter of the County of ....., State of California, and am registered as intending to affi-

liate with the Republican Party. I have not signed the nomination paper of any other candidates for the same office, and further declare that I intend to support the nomination of the candidate named herein at the Republican Party presidential primary to be held on the ..... day of ....., 19.....

Number	Precinct	Signature	Residence	Date
1				
2				
3				
etc.				

Verification Deputy's Affidavit

I, ..., solemnly swear (or affirm) that I have been appointed as a verification deputy to secure signatures in the County of ..... to the nomination paper of the candidate named in the signer's statement above as candidate for nomination by the Republican Party at its presidential primary election; that all the signatures on this section of the nomination paper numbered from 1 to ....., inclusive, were made in my presence, and that to the best of my knowledge and belief each signature is the genuine signature of the person whose name it purports to be.

(Signed) .....
Verification Deputy

Subscribed and sworn to before me this ..... day of ...., 19.....

.....
Notary Public (or other official)

Article 5. Verification Deputies

6030. The candidate or his designee may arrange for the appointment of verification deputies to serve within the county in which the deputies reside in securing signatures to the nomination paper of the candidate. The verification deputies thus appointed are the duly authorized verification deputies to secure signatures to the nomination paper of the candidate in that county. The form on which the verification deputies are appointed shall be filed with the county clerk of the county in which the verification deputies reside, at or before the time the nomination paper of the candidate is left with the county clerk for examination. Additional verification deputies may be appointed in the same manner as the original verification deputies were appointed.

6031. The verification deputies may be appointed by the candidate or his designee on a form which shall be substantially as follows:

APPOINTMENT OF VERIFICATION DEPUTIES BY CANDIDATE OR HIS DESIGNEE

I, the undersigned candidate or designee, do hereby appoint the following voters of the County of ..... as verification deputies to obtain signatures, in that county, to nomination papers for ..... as a candidate in the Republican Party presidential primary, to be held the ..... day of ....., 19.....

Verification Deputies

Name	Residence
.....	.....
.....	.....
.....	.....
etc.	etc.

Candidate or His Designee

(Signed)

Name Residence

....

Filed in the office of the County Clerk of .....
County, this ..... day of ....., 19.....

....., County Clerk

By ....., Deputy

6032. Verification deputies may obtain signatures to the nomination paper of a candidate for whom they were appointed, at any time not more than 104 nor less than 74 days prior to the presidential primary.

6033. The verification of signatures to nomination papers shall not be made by a county clerk, a deputy county clerk, or within 100 feet of any election booth, polling place, or any place where registration of electors is being conducted.

Article 6. Arrangement and Examination of Nomination Papers

6040. Each section of a nomination paper, after being verified, shall be returned by the verification deputy who circulated it to the candidate or his designee by whom the verification deputy was appointed. All the sections circulated in any county he shall be collected by the candidate or his designee and he shall arrange and leave the sections with the county clerk for examination.

6041. Prior to filing, the sections of a nomination paper for a candidate shall be numbered in order.

6042. Nomination papers, properly assembled, may be consolidated and fastened together by counties, but nomination papers signed by voters in different counties shall not be thus fastened together.

6043. The county clerk shall examine all nomination papers left with him for examination and shall disregard and mark "not sufficient" the name of any voter of his county which does not appear in the same handwriting on an affidavit of registration in the office of the county clerk. He shall also disregard and mark "not sufficient" the name of any voter of his county who has not stated his intention to affiliate with the Republican Party.

6044. Within five days after any nomination papers are left with him for examination, the county clerk shall:

(a) Examine and affix to them a certificate reciting that he ha examined them and stating the number of names which have not been marked "not sufficient."

(b) Transmit the papers with the certificate of examination to the Secretary of State, who shall file the papers.

6045. The county clerk's certificate to nomination papers of a candidate shall be in substantially the following form:

COUNTY CLERK'S CERTIFICATE TO NOMINATION PAPERS OF A CANDIDATE

To the Secretary of State:

I, County Clerk of the County of ....., hereby certify that I have examined the nomination papers, to which this certificate is attached, of the candidate for the ensuing presidential primary, and that the number of names which I have not marked "not sufficient" is .....

The candidate named in the nomination papers is.....

.....

Dated this ..... day of ....., 19.....

....., County Clerk

By ....., Deputy

6046. No filing fee is required from any person to be voted for at a presidential primary.

Article 7. Certified List of Candidates, Notice of Election

6050. At least 59 days before a presidential primary, the Secretary of State shall transmit to each county clerk a certified list containing the names and addresses of the candidates for whom nomination papers have been filed and who are entitled to be voted for at the presidential primary.

The certified list shall be in substantially the following form:

CERTIFIED LIST OF CANDIDATES
SECRETARY OF STATE

To the County Clerk of .....County:

I, ..., Secretary of State, do hereby certify that the following list contains the name and post office address of each person for whom nomination papers have been filed in my office and who is entitled to be voted for at the presidential primary to be held on the ..... day of ....., 19...., as nominee of the Republican Party.

List of Candidates
Republican Party

Name	Address
1	.....
2	.....
3	.....
etc.	etc.

Dated at Sacramento, California, this ..... day of..... ....., 19.....

.....

(SEAL)

Secretary of State

6051. Immediately after the county clerk receives the certified list of candidates from the Secretary of State, he shall publish it in a presidential primary notice, under the party designation. The notice shall also contain:

(a) The date of the election.

(b) The hours during which the polls will be open.

6052. The publication of the presidential primary notice shall be made in the county pursuant to Section 6061 of the Government Code, and by causing a copy thereof to be posted at the courthouse door and at such other places in the county as are designated by ordinance for the posting of public notices.

The cities or town of residence of the candidates shall be included in the presidential primary notice.

6053. The notice of the list of candidates published by the county clerk shall be in substantially the following form:

NOTICE BY COUNTY CLERK OF TIME AND PLACE OF PRESIDENTIAL PRIMARY ELECTION, POLITICAL PARTIES ENTITLED TO PARTICIPATE THEREIN, AND NAMES AND ADDRESSES OF CANDIDATES

Notice is hereby given that a Republican presidential primary election is to be held in the County of ..... on the ..... day of ....., 19....., and that there is stated the name and address of each person for whom nomination papers have been filed in the office of the Secretary of State and who is entitled to be voted for, at the election, as nominee of that party for President.

List of Candidates
Republican Party

Name	Address
1	.....
2	.....
3	.....
etc.	etc.

Notice is also hereby given that at the presidential primary the polls will be open from the hour of 7 o'clock a.m. to the hour of 8 o'clock p.m. on the day thereof.

Dated this ..... day of ....., 19.....

....., County Clerk

Article 8. Canvas of Returns. Certificate of Election

6055. The Secretary of State shall, not later than the 24th day after the election, compile and file in his office a statement of the canvassed returns filed with him by the county clerks.

The compiled statement shall show for each candidate the total of the votes received and the votes received in each county.

6056. The Secretary of State shall, not later than the 24th day after the election, issue a certificate of election to the candidate who received the largest vote cast of that party, such person thereby being the party's presidential nominee candidate from California.

6057. The Secretary of State shall, not later than the 24th day after the election, issue a certification to delegate to each person selected as a delegate.

Article 9. Write-In Candidates

6060. Notwithstanding any other provisions of law, a space shall be provided on the presidential primary ballot for an elector to write in the name of a candidate for President of the United States.

6061. Any person who believes his name may be used as a write-in candidate for President of the United States shall, not later than 21 days before the primary election, file his endorsement of his write-in candidacy with the Secretary of State, or no votes shall be counted for him.

6062. Any person who receives, by write-in vote, a plurality of the votes cast for President of the United States shall, within 10 days after the primary election, file a list of delegates to the national convention of his political party with the Secretary of State in the manner prescribed in Section 6071.

6063. If the candidate fails to file a list of delegates, the state central committee of the party in whose primary the candidate receive the plurality vote shall, within 10 days of the end of the 10-day period required in Section 6062, file a list of delegates with the Secretary of State. The delegation shall go to the convention unpledged to any candidate.

Article 10. Selection of Delegates

6070. Every candidate whether selected pursuant to Section 6010, or unselected as defined in Section 6013, who wishes to have a delegation of electors pledged to his candidacy in accordance with the result of the presidential preference primary or who wishes to have an official California delegation at the Republican National Convention shall form a delegation in compliance with Section 6071 of this code.

6071. (a) The delegation of each candidate shall be composed as follows:

(1) Seventy-eight percent of the delegation, or the nearest whole number thereto which provides for a total number of district delegates equal to at least three times the number of congressional districts within the state, shall be composed of three delegates selected for each congressional district.

(2) The remainder of the delegation shall be composed of delegates selected at large from throughout the state.

The names of the persons chosen as delegates shall be submitted to the Secertary of State, by the candidate or his designee, no later than 30 days before the presidential primary election for certification.

(b) There shall be no more than one alternate per delegate. Alternates shall be appointed by the candidate or his designee and shall be appointed by congressional districts, the number per congressional district to be no less than three. Such alternates shall be submitted to the Secretary of State within thirty (30) days after the primary for certification.

(c) Each delegate to the Republican National Convention shall use his best efforts at the convention for the party's presidential nominee candidate from California to whom the delegate has pledged support until such person is nominated for the office of President of the United States by such convention, receives less than 10 percent of the votes for nomination by such convention, releases the delegate from his obligation, or until two convention nominating ballots have been taken. Thereafter, each delegate shall be free to vote as he chooses, and no rule may be adopted by a delegation requiring the delegation to vote as a body or causing the vote of any delegate to go uncounted or unreported.

Article 11. Republican Presidential Primary Ballot

6080. The format of the presidential portion of the Republican primary ballot shall be governed by the provisions of Chapter 2 (commencing with Section 10200) of Division 7, with the following exceptions:

(a) Instructions to voters shall exclude any reference to groups of candidates preferring a person whose name appears on the ballot or references to any group of candidates not expressing a preference for a particular candidate.

(b) In place of the heading: "FOR DELEGATES TO NATIONAL CONVENTION. Vote for One Group Only." shall appear the heading: "PRESIDENTIAL PREFERENCE. Vote for One."

(c) Candidates for President shall be listed on the ballot in the same order provided for in Chapter 2 (commencing with Section 10200) of Division 7 for statewide candidates.

(d) Only the names of selected and unselected presidential candidates shall appear on the ballot in the spaces provided. No reference shall be made to their being preferred by candidates for delegates to the national convention.